

EDITOR'S NOTE

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QUESTION PRESENTED

Should the Court impose the habeas corpus exhaustion-of-state-remedies requirement as a prerequisite to a state prisoner bringing a 42 U.S.C. § 1983 action for monetary damages against state employees in their personal capacities for the denial of sentence credits.

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NO. 90-5854

IN THE
SUPREME COURT
OF THE
UNITED STATES

OCTOBER TERM, 1990

ROBERT H. YOUNG,

Petitioner,

v.

PHYLLIS KENNY, THOMAS MANNING,
and HENRY ROSE,

Respondents.

**ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

BRIEF IN OPPOSITION

Respondents Phyllis Kenny and Henry Rose, acting through their attorneys, Kenneth O. Eikenberry, Attorney General; Kathleen D. Mix, Senior Assistant Attorney General, and Martin E. Wyckoff, Assistant Attorney General, respond to Robert H. Young's petition for writ of certiorari.

I. ISSUES PRESENTED

A. The Supreme Court should deny this petition as Mr. Young does not present good reasons for this Court to grant certiorari.

B. There is not a live case or controversy at the current time. Therefore, the Supreme Court lacks subject matter jurisdiction to entertain this writ.

C. The doctrines of res judicata and collateral estoppel, along with the doctrines of federalism and comity, militate against the granting of this writ.

II. OPINIONS BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit, as amended on denial of the petition for rehearing, is reported at 907 F.2d 874. The Court of Appeals' initial opinion was published at 887 F.2d 237. The United States District Court's order is unreported.

III. JURISDICTION

The Court of Appeals' amended opinion and order denying rehearing were filed and entered on June 25, 1990. The jurisdiction of the Supreme Court rests upon 28 U.S.C. § 1254(1).

IV. STATUTORY PROVISIONS INVOLVED

28 U.S.C. § 2254 and 42 U.S.C. § 1983.

V. STATEMENT OF THE CASE

On October 16, 1987, Mr. Young filed the 42 U.S.C. § 1983 complaint that is the subject of this petition. The action was brought against members of the Washington State Indeterminate Sentence Review Board (ISRB). This agency is responsible for the calculation of a prisoner's term of confinement, including the award or denial of time credits. Further, the ISRB determines if a person shall be paroled. Mr. Young's original request for relief sought:

1. A reduction of his maximum sentence based on the award of credits for jail time served.

2. Damages for failure to apply jail credits against his minimum term.
3. Prospective injunctive relief to preclude the board from denying him jail credits. CR 2.¹

On January 14, 1988, the ISRB granted Mr. Young 255 days time credit against his maximum sentence for jail time served. This was the full amount of time credit available to Mr. Young. Mr. Young then deleted from the complaint his first request for relief. On February 23, 1988, the United States District Court *sua sponte* ordered the parties to brief the question of whether Mr. Young must exhaust state remedies before proceeding in his 42 U.S.C. § 1983 action. CR 21. Apparently, the District Court was unaware that on January 14, 1988, Mr. Young had received the time credits in question.

Ultimately, the District Court dismissed the complaint for failure to exhaust state remedies. CR 51 and 52. A timely appeal was filed from the order of dismissal and final judgment. CR 57.

In Mr. Young's opening brief to the Ninth Circuit, Mr. Young stated, "Plaintiff's complaint sought damages and prospective injunctive relief only." The Ninth circuit rendered its opinion. In the subsequent petition for rehearing en banc, counsel for Young improperly presented the case as only a request for damages, failing to inform the court of the prospective injunctive relief also sought in the complaint. Young's counsel never informed the Ninth Circuit of the full spectrum of relief sought in the complaint.

The Ninth Circuit vacated the original opinion and denied rehearing. A new opinion was entered based on Mr. Young's counsel's misrepresentation of the nature of the relief sought in the original complaint. *Young v. Kenny*, 907 F.2d 874 (9th Cir. 1990).

¹ CR refers to the United States District Court Clerks Record; e.g., Clerk's Record Document Number 2.

Mr. Young now petitions this Court for a writ of certiorari and again misrepresents the relief sought in his 42 U.S.C. § 1983 action.

VI. REASONS FOR DENYING THE WRIT

A. THE SUPREME COURT SHOULD DENY THIS PETITION AS MR. YOUNG DOES NOT PRESENT GOOD REASONS FOR THIS COURT TO GRANT CERTIORARI.

Certiorari is not a matter of right, but rather a matter of judicial discretion. Sup. Ct. R. 10. This petition for certiorari does not meet any of the criteria set forth in Rule 10.

As Mr. Young notes, six other circuits are in accord with the Ninth Circuit. See Petition, p. 7. Thus, no Court of Appeals has rendered a decision that conflicts with the Ninth Circuit's decision. The Ninth Circuit actually found that nine other circuits had considered the question and arrived at the same conclusion. Mr. Young in Footnote 2 of his Petition attempts to distinguish three of these cases. These distinctions are meritless, as the ultimate holding in each case mandated exhaustion of state remedies based on the same principles of comity that are at issue here.²

As no circuits are in conflict, petitioner does not meet the criteria set forth in Subsection (a) of Sup. Ct. R. 10.

Neither does the petitioner meet the criteria set forth in Subsection (b). No state court decision is in question.

²The First Circuit found *Preiser* not controlling but stated *Preiser* was highly relevant and that the integrity of the writ of habeas corpus must not be circumvented. The Court noted that due respect to the principles of federalism and comity required the Court to dismiss most of Guerro's claims. The First Circuit remanded to the District Court to determine if Guerro's damage claim required the Court to consider the legality of Mr. Guerro's conviction. *Guerro v. Mulhearn*, 498 F.2d 1249 (1st Cir. 1974). The Second Circuit noted that Mr. Mack's claim did not rely on an attack on either the validity of his conviction or the duration of his confinement. The Second Circuit noted that a prisoner could not mount that type of challenge in a 42 U.S.C. § 1983 action. *Mack v. Varelas*, 835 F.2d 995 (2nd Cir. 1987).

Respondents agree with Mr. Young's interpretation of *Brown v. Fauver*, 819 F.2d 395 (3rd Cir. 1987). However, the Third Circuit has not addressed the question presented today and, thus, has not ruled contrary to any other circuit or the Supreme Court.

Mr. Young argues that Rule 10(c) applies. He contends that the circuits have decided the legal question now before the Court in a way that conflicts with the Supreme Court decisions in *Preiser v. Rodriguez*, 411 U.S. 475 (1973), and *Wolff v. McDonnell*, 418 U.S. 539 (1974). Such is not the case.

The Court in *Preiser* noted that the essence of a habeas corpus petition is an attack by a person in custody upon the legality of custody or the duration of his or her confinement. *Preiser*, 411 U.S. at 487.

In *Preiser* the plaintiffs sought restoration of good time credits, which clearly fell within the core of habeas. On appeal plaintiffs argued that if they were forced to exhaust state court remedies an adverse ruling would have a res judicata effect in subsequent civil rights actions. The *Preiser* Court carefully noted that that question was not before it. The Court stated:

The answer to this contention is that the respondents here sought no damages, but only equitable relief—restoration of their good-time credits—and our holding today is limited to that situation.

Preiser, 411 U.S. at 494. Although the Court addressed the availability of a damage action in dicta, the Court also went on at great length to clarify previous rulings. The Court noted that when an inmate brings a civil rights action challenging the conditions of confinement, rather than the fact or length of confinement, such an action would be allowed. *Preiser*, 411 U.S. at 498-99. This dicta formed the basis for the Court's ruling in *Wolff v. McDonnell*. The *Wolff* court noted that:

[H]abeas corpus is not an appropriate or available remedy for damages claims, which, if not frivolous and of sufficient substance to invoke the jurisdiction of the federal court, could be pressed under § 1983 along with suits challenging the conditions of confinement rather than the fact or length of custody.

Wolff, 418 U.S. at 554. (Emphasis added.)

The plaintiffs in *Wolff v. McDonnell* sought damages for deprivation of civil rights resulting from the use of allegedly unconstitutional procedures. *Wolff*, 411 U.S. at 553. The *Wolff* Court carefully noted that in the prayer of the amended complaint damages in the sum of \$75,000 were sought "for the deprivation of the various constitutional rights involved in litigation, necessarily including the right to due process." *Wolff v. McDonnell*, 418 U.S. at 553, n. 11. Thus, the plaintiffs in *Wolff* were not attacking either the length or fact of their custody but rather a condition of confinement. They were challenging the constitutionality of prison procedures.

In the case currently at bar, Mr. Young seeks damages for failure to certify jail credit time. In order to succeed on the claim, he must establish liability, which will entail a finding that he is or was entitled to a shortening of his sentence. Thus, a critical element of his action touches on the core of habeas as Mr. Young in fact attacks the length of his confinement. Such a case is clearly barred by the holdings of both *Preiser* and *Wolff*.

The Fifth Circuit noted that there was a possible conflict if the *Wolff* court's decision was improperly interpreted. The Fifth Circuit stated that:

Although the opinion is unclear as to whether the loss of good time credits could be claimed as an element of damages, we do not believe the Court so intended. The Supreme Court ruled that on remand the district court was foreclosed from issuing an injunctive restoration of good time credits, but could assist a plaintiff in obtaining "ancillary relief" by enjoining the prospective enforcement of invalid prison regulations.

From the Court's delineation of permissible and impermissible uses of the district court's injunctive and declaratory powers on remand of the *Wolff* case, we conclude that the Court authorized the district court to examine the constitutionality of the state prison procedure, and to award damages which were incidental to an invalid proceeding. Since the district court was expressly forbidden to enter an injunction concerning the merits of the issue before the state administrative body

(i.e., the proper length of confinement), however, it follows as a matter of logic that the district court was similarly prohibited from awarding damages for excessive confinement.

Fulford v. Klein, 529 F.2d 377, 381 (5th Cir. 1976). (Emphasis added.)

This is the interpretation of each Court of Appeals to consider the question. This interpretation reconciles *Preiser* with *Wolff*. To give *Wolff* the meaning petitioner here seeks would mean that the *Wolff* case overruled *Preiser*. However, *Wolff* cited *Preiser* with approval and with no indication that the Court intended to overrule or modify the *Preiser* decision.

Further evidence that the Fifth Circuit's interpretation is correct is found in *Preiser*. The court succinctly stated:

If a prisoner seeks to attack both the conditions of his confinement and the fact or length of that confinement, his latter claim, under our decision today, is cognizable only in federal habeas corpus, with its attendant requirement of exhaustion of state remedies. But, consistent with our prior decisions, that holding in no way precludes him from simultaneously litigating in federal court, under § 1983, his claim relating to the conditions of his confinement.

Preiser, 411 U.S. at 499, n. 14. (Emphasis added.)

Thus, eight circuits excluding the Ninth Circuit have reached the same conclusion. If a 42 U.S.C. § 1983 action attacks the fact or length of confinement the writ of habeas corpus is the sole remedy. A 42 U.S.C. § 1983 action that demands adjudication of either the validity of confinement or length of confinement as a predicate to a finding of liability is barred by 28 U.S.C. § 2254. The Ninth Circuit agrees with these eight circuits. *See generally, Young v. Kenny*, 907 F.2d 874, 876 (9th Cir. 1990).

This court should deny the petition for certiorari as the petitioner fails to set forth any reason pursuant to Sup. Ct. R. 10 for granting certiorari.

B. THERE IS NOT A LIVE CASE OR CONTROVERSY AT THE CURRENT TIME. THEREFORE, THE SUPREME COURT LACKS SUBJECT MATTER JURISDICTION TO ENTERTAIN THIS WRIT.

It is uncontested that on January 14, 1988 the ISRB credited Mr. Young's maximum sentence with 255 days of jail time credits. Thus, since January 14, 1988, there has not been a live case or controversy as to the issue of whether Mr. Young must exhaust state remedies pursuant to habeas corpus prior to bringing this 42 U.S.C. § 1983 action.

Neither a state nor federal habeas petition could be maintained as Mr. Young would have already received the relief requested. Thus, the habeas corpus action would be moot. The 42 U.S.C. § 1983 action is not moot as Mr. Young may proceed with a damage claim. *See, City of Los Angeles v. Lyons*, 461 U.S. 95 (1983).

The issue before the Court today is whether Mr. Young needs to exhaust habeas corpus remedies prior to proceeding in a 42 U.S.C. § 1983 action for damages and prospective injunctive relief.

Persons seeking to invoke the power of federal courts must allege an actual case or controversy in order for the Court to have subject-matter jurisdiction. U.S. Const.art. III, § 2, cl. 1; *Powell v. McCormack*, 395 U.S. 486 (1969).

An actual controversy between the parties must exist at all stages of appellate or certiorari review and not simply at the date the action is initiated. *Wiley v. National Collegiate Athletic Association*, 612 F.2d 473 (10th Cir. 1979); *cert. denied*, 446 U.S. 943.

By the time the District Court entered the order dismissing this case, the reason for dismissal no longer existed. The Ninth Circuit never had a live case or controversy in this case. Before the appeal was filed, Mr. Young received the jail time credits that formed the basis for the appeal.

This Court should deny the writ for certiorari or, in the alternative, remand this case to the Ninth Circuit for deter-

mination as to whether the opinion in 907 F.2d 874 must be vacated for want of subject matter jurisdiction.

C. THE DOCTRINES OF RES JUDICATA AND COLLATERAL ESTOPPEL, ALONG WITH THE DOCTRINES OF FEDERALISM AND COMITY, MILITATE AGAINST THE GRANTING OF THIS WRIT.

1. The Issue of Res Judicata.

Res judicata is claim preclusion. Contrary to Mr. Young's contentions, the Supreme Court has recognized that res judicata precludes allowing 42 U.S.C. § 1983 actions to go forward if they touch upon the core of habeas. The *Wolff* Court noted that it anticipated the normal principles of res judicata would apply in a 42 U.S.C. § 1983 action. *Wolff*, 418 U.S. 554, n. 12. The *Preiser* Court noted that the principles of res judicata fully apply to civil rights actions:

Accordingly, there would be an inevitable incentive for a state prisoner to proceed at once in federal court by way of a civil rights action, *lest he lose his right to do so*. This would have the unfortunate dual effect of denying the state prison administration and the state courts the opportunity to correct the errors committed in the State's own prisons, and of isolating those bodies from an understanding of and hospitality to the federal claims of state prisoners in situations such as those before us.

Preiser, 411 U.S. at 497. (Emphasis added.)

If Mr. Young were allowed to proceed in his 42 U.S.C. § 1983 action prior to exhausting habeas corpus proceedings, the issue of the length of his custody would have to be litigated in order for Mr. Young to prove liability. This would circumvent 28 U.S.C. § 2254 with its attendant state exhaustion requirements. Congress intended 28 U.S.C. § 2254 to be the sole remedy.

2. The Issue of Collateral Estoppel.

Mr. Young attempts to persuade the Court that the doctrine of collateral estoppel is inapplicable. Mr. Young's

argument is prefaced upon his assertion that he sought only damages against state officials in their individual capacity, not their official capacity. Thus, he concludes that because the State and its employees in their official capacities are not parties to the 1983 action an essential element of collateral estoppel is absent.

Mr. Young misstates the facts. The complaint, in fact, sought prospective injunctive relief as well as damages. *See, Complaint, CR 2; see also, Mr. Young's Opening Brief to the Ninth Circuit.* In Mr. Young's opening Ninth Circuit brief he states, "Plaintiff's Complaint Sought Damages and Prospective Injunctive Relief Only." *Opening Brief, p. 4.*

Because prospective injunctive relief is sought, the defendants are sued in both their individual and official capacity. *See, Ex parte Young, 209 U.S. 123 (1908).* The essential element of collateral estoppel Mr. Young claims is absent is fulfilled, and the danger that a 42 U.S.C. § 1983 action will have preclusive effect on a subsequent 28 U.S.C. § 2254 action is present. The many circuits have recognized this potential danger and uniformly refuse to allow the civil rights action to proceed prior to exhaustion of habeas corpus remedies. The Court should deny this writ.

3. The Doctrines of Federalism and Comity.

It is the principles of federalism and comity which led the federal courts to stay actions such as Mr. Young's. Only by staying the 42 U.S.C. § 1983 action and requiring exhaustion of state remedies can the federal court avoid "interference with matters of intense and intimate state concern." *Guerro, 498 F.2d at 1253.*

States have substantial interests in the administration of their prisons and their state courts. There is a strong comity consideration at stake here. State, not federal courts, should be allowed to address issues regarding the validity of a conviction or the length of incarceration prior to federal intervention. *See, Preiser, 411 U.S. at 491.* Indeed, the *Preiser* Court stated:

It is difficult to imagine an activity in which a State has a stronger interest, or one that is more intricately bound up with state laws, regulations, and procedures, than the administration of its prisons. The relationship of state prisoners and the state officers who supervise their confinement is far more intimate than that of a State and a private citizen. . . . Since these internal problems of state prisons involve issues so peculiarly within state authority and expertise, the States have an important interest in not being bypassed in the correction of those problems.

Preiser, 411 U.S. at 491-492. The Supreme Court has long recognized the principles of comity and federalism at stake here and should not jeopardize these principles, as recognized by the many circuits, by granting this writ.

VII. CONCLUSION

For the above-stated reasons, the respondents respectfully request that this Court either deny the petition for writ certiorari, or remand this case to the Ninth Circuit for a determination as to whether the Ninth Circuit had subject-matter jurisdiction to entertain any appeal in this case.

DATED this 19th day of December, 1990.

Respectfully submitted,

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